United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7498

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ALVIN TROTMAN and FRANKLIN MITCHELL,

Plaintiffs-Appellees,

-against-

THE PALISADES INTERSTATE PARK COMMISSION, MORGAN CLARK, JOHN DOE OFFICERS OF THE PALISADES INTERSTATE PARK COMMISSION 1-3,

Defendants,

PALISADES INTERSTATE PARK COMMISSION,

Defendant-Appellant.

----------X

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Preliminary Statement

This is an appeal by defendant, Palisades Interstate Park Commission, from an order of the District Court, Southern District, (KNAPP, D.J.), denying defendant's motion to dismiss plaintiffs' complaint as to defendant Palisades Interstate Park Commission on the ground that defendant Palisades is immune from suit under the Eleventh Amendment. This appeal is by permission pursuant to 28 USC 1292(b), upon the certification of Judge Knapp.

STATEMENT OF ISSUES

Is the Palisades Interstate Park Commission an agency of the State of New York immune from suit under the Eleventh Amendment to the Constitution?

The Court below held Palisades Interstate Park Commission was not entitled to claim immunity under the Eleventh Amendment.

STATEMENT OF THE CASE

Plaintiffs were driving their automobile on a road under the jurisdiction of the Palisades Interstate Park Commission, and were stopped by officers employed by the Commission. The officers possessed neither a search warrant nor an arrest warrant and did not have probable cause to stop, search or arrest the plaintiffs. The plaintiffs' automobile was searched and they were forced to stand outside of the automobile at gunpoint. A false report was thereafter made to the plaintiffs' employers resulting in their suspension from work, loss of pay, embarrassment and humiliation. Investigation by the plaintiffs' employers led to reinstatement of the plaintiffs.

Plaintiffs subsequently brought this action alleging that the officers actions were done under color of state law and during the course of their employment, and the officers actions violated plaintiffs' rights under the Fourth, Fifth,

Eighth and Fourteenth Amendments of the United States Constitution. Pendant State claims against the Palisades Interstate Park Commission were included under the doctrine of Respondent Superior. The Park Commission and Morgan Clark were duly served, and a Notice of Claim was duly filed. Defendant Park Commission moved to dismiss the complaint on the ground that the Park Commission as an agency of the State enjoys Eleventh Amendment immunity from such actions. Honorable Whitman Knapp, D.J. denied the motion holding the Park Commission is not entitled to claim sovereign immunity under the Eleventh Amendment (Appendix pp. 26-29).

ARGUMENT

POINT I

PALISADES INTERSTATE PARK COMMISSION IS AN INDEPENDENT BODY AND DOES NOT SHARE ELEVENTH AMENDMENT IMMUNITY WITH THE STATE OF NEW YORK.

The determinative factor of whether a corporate body politic is an agnecy sufficiently tied to the state to receive immunity under the Eleventh Amendment is "ultimate state liability". The criteria used to make such a determination were stated by the Honorable Whitman Knapp, J.D., in deciding the motion here on appeal (Appendix p. 27). Those factors are: "ability to sue and be sued, lack of express authority to sue, performance by the entity of an 'essential governmental function', power to take property in the name of the State, power to take property in its own name, corporate status, lack of corporate status, financial interest of one State and the absence of State financial interest." Whitten v. State University Construction Fund, 493 F. 2d 177, 179-180 (1st Cir., 1974); Forman v. Community Services, Inc., 500 F. 2d 1246. After an analysis of the above factors, Judge Knapp concluded that the Commission does not enjoy Eleventh Amendment immunity (Appendix pp. 26-29). Critical to Judge Knapp's analysis of the Commission's status relative to sovereign immunity is the

fact that the Commission cannot pledge the credit of New York State "except by and with the authority of the legislature thereof." Appellants argue this clause of the Compact applies solely to contractual obligations which are beyond any appropriation to the Commission. The Commission, however, generates revenue beyond its State appropriation. Further the Compact makes no such distinction when granting the Commission the right to sue and be sued in its own name. Mere speculation is not enough to conclude as Appellants that the above portion of the Compact refers to contractual rather than any other obligation. As the Court stated in Byram River v. Village of Port Chester, New York, 394 F. Supp. 618 (1975), referring to Edelman v. Jordan, 415 U.S. 651 (1961):

> "... in deciding whether a State bar waived its constitutional protection under the eleventh amendment, a court must look for express language or other form of overwhelming intent on the part of Congress to effect such a result."
> Byram River, supra at 626

Neither Congress nor the New York State Legislature has stated that a suit against the Commission is limited solely to contractual obligations, and such an inference contradicts the plain language of both the Compact and the Parks and Recreation Law, Article 9.

Article 9, Parks and Recreation Law Section 9.09, Employees states in pertiennt part:

1. The commission shall have the power to take any action necessary for securing and maintaining the benefits of the public retirement systems of this State for its employees in this state and for such purpose employees of the commission to the extent to which the compensation paid for their services is derived from funds appropriated by this state shall be deemed to be employees of this state..."

2. For the purposes of eligibility for participation in the state health insurance plan under article eleven of the civil service law and for survivors benefits...shall be deemed employees of this state and qualified for such participation and benefits.

The Commission was given authority under Article 9 to "appoint such employees, including members of the regional state park police," to effectively fulfill its functions. Employees so appointed are employees of the Commission subject to Commission rules and regulations. As subsections 1 and 2 of Section 9.09 indicate the legislature included Commission within the jurisdiction of the Civil Service for specified purposes, and to bestow the ambit of civil service benefits upon Commission employees. The distinction made in Article 9 section 9.09(3) is budgetary to divide responsibility for civil service benefits between the two compacting states, as evidenced by the fact that the Commission and not the State is charged with the appointment and size of Commission staff,

including park police.

Further, Appellants cannot logically argue that the Commission is the alter ego of the State in which case all its employees would be State employees to some degree, and alternatedly that only those paid in full from State appropriation are State employees. Neither argument is applicable as the foregoing indicates.

The Commission herein enjoys a separate existence, transacts its own business, hires and compensates its own employees, and has ability to sue and be sued, and generally acts as the separate corporate entity it in fact is; the Commission is not the alter ego of the State or an agency therefrom and hence cannot claim sovereign immunity.

POINT II

PALISADES INTERSTATE PARK COMMISSION IS A "PERSON", SUBJECT TO SUIT UNDER 42 USC 1983.

The words "every person" as used in Section 1983 are not construed as to exclude a corporation which seeks to redress or preserve its rights under the Due Process clause and Equal Protection Clause of the Fourteenth Amendment, Adams v. Park Ridge (CA7, 1961) 293 F. 2d 585. So too, a corporation is a "person" within the meaning of 42 USC 1343 when it violates the constitutional rights of a citizen. McCoy v. Providence Journal Co. (1951, CA1 RI.) 190 F2d 760, cert den 342 US 894, 96 L Ed 669, 72 S Ct 200; Watchtower Bible & Tract Soc. v. Los Angeles County (1950, CA9 Cal) 181 F2d 739, cert den 340 US 820, 95 L Ed 602, 71 S Ct. 51; NAACP v. Patty (1958, DC Va) 159 F Supp 503, vacated on other grounds Harrison v. NAACP, 360 US 167, 3 L Ed 2d 1152, 79 S Ct. 1025. The fact that such corporation receives substantial or significant funding from the State does not mean it is not a "person" within the meaning of section 1983. Kerr v. Enoch Pratt Free Library (1945, CA4 Md) 149 F2d 212, cert den 326 US 721; Brown v. Strickler (1970, CA6 Ky) 422 F2d 1000. While the above cases deal with the notion of acting under "color of law," they also demonstrate that mere financing by the State does not take the corporation out of the ambit of Section 1983.

The Commission, like any other corporation is a "person" under 1983. Assuming, arguendo, that the Commission is an agency of the State and Appellees have complied with appropriate provisions of the Court of Claims Act, a recent case states that "while municipal corporations, that is, municipalities are not deemed 'persons' under the Civil Rights Act, ... 'agencies have always been so deemed. See, eg. Escalera v. New York City Housing Authority, 425 F2d 853 (2d Cir. 1970), cert denied 400 U.S. 853 (1971); Holmes v. New York City Housing Authority, 398 F2d 262 (2d Cir. 1968)." Forman v. Community Services, 500 F2d 1246, 1255 (1974). The Court in Forman goes on to state that the Authority is also not immune from suit under the Eleventh Amendment because of an express waiver. However, citing Whitten v. State University Fund, 493 F2d 177 (1974) the Court states that "Even were such a waiver absent the agency is not an "alter ego of the state." Forman, supra, 1256. The same reasoning used in Forman to determine Community Services status as a municipal agency is here applicable. Further, the most critical element observed by the Forman court was the fact that the State was not liable for the debts of the Community Service. While there is no express language in the Compact, the general independence of action and administration afforded the Commission coupled with the express language that the Commission shall not pledge the State's credit establishes the Commission liability and not

the State's.

Appellants rely upon a recently decided case to buttress the notion that the Commission is not a "person" within the meaning of Section 1983. Mondell v. Dept. of Soc. Serv. of City of New York, 532 F2d 259 (1976), does not stand for the proposition that all State agencies or instrumentalities are accorded eleventh amendment immunity. Referring to the question, the Court stated:

> "When we consider so-called independent agencies of the state or city, we must recognize that not all have the same character, function or degree of independence."
>
> Mondell, supra at 263

Palisades enjoys sufficient independence of character and function to lift it from control by the State to self control and thereby outside the eleventh amendment for immunity purposes.

The Court in Mondell p. 263 n.4, outlined those indicia of independence which made the State Housing Finance Agency subject to suit independent of the State; indicia consistent with Byram River supra and Whitten supra.

POINT III

STATUE OF LIMITATIONS IS NOT A PROPER DEFENSE TO RAISE ON A MOTION TO DISMISS UNDER FRCP 12(b).

Appellants herein have appealed pursuant to 28 USC 1292(b). Subsection b of Section 1292 cannot be used to raise affirmative defenses on appeal from denial of a motion to dismiss pursuant to FRCP 12(b). Such motion cannot be made in a motion to dismiss, and must be raised if at all in an answer. Topping v. Fry (1945, CA7 Ill.) 147 F2d 715; Bergeron v. Mansour (1945, CA1 Mass) 152 F2d 27; Falsetti v. United States Mine Workers (1964, D.C. Pa) 34 FRD 461. Further, section 1292 (b) is inappropriate for use on questions that lie within the discretion of the trial judge. Phelps v. Burnham (CA 2d 1964) 327 F2d 812; Burbank v. General Electric Co. (CA9, 1964) 329 F2d 825; Kerby v. Commodity Resources, Inc. (1975, DC Colo) 395 F. Supp 786. Statue of limitations is such an affirmative defense pursuant to FRCP 8(c) and is not properly part of Appellants motion to dismiss or this appeal.

The mere filing of a notice of appeal pursuant to 1292(b) does not automatically divest the District Court of jurisdiction over those questions not certified by the District Court and all such matters not upon appeal can be determined by the District Court as if no such appeal had been taken.

O'Brien v. Avco Corp. (DC-N.Y.) 309 F. Supp 703. The District Court maintains jurisdiction to determine the matters raised by Appellant's in Point III of their appeal.

While the Court of Appeals is not limited in its scope to the question certified by the District Court as controlling, the Appellate Courts are loathe to go beyond that certification where the additional matters are clearly within the District Court's purview and a determination would not accomplish an end to the litigation as to all defendants Katz v. Carte Blanche Corp. (1974 CA3 Pa) 496 F2d 747, cert denied 419 US 885; Bersch v. Drexel Firestone, Inc. (1975 CA2 N.Y.) 519 F2d 974. In the instant action another defendant, Morgan Clark, has been duly served, and remains a party to this action.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE SUSTAINED AND THE CASE REMANDED FOR TRIAL ON ITS MERITS.

Dated: November 19, 1976

Respectfully submitted,

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